IN THE

Supreme Court of the United States

OCTOBER TERM A. D., 1951

TESSIM ZORACH, et al.,
Appellant,

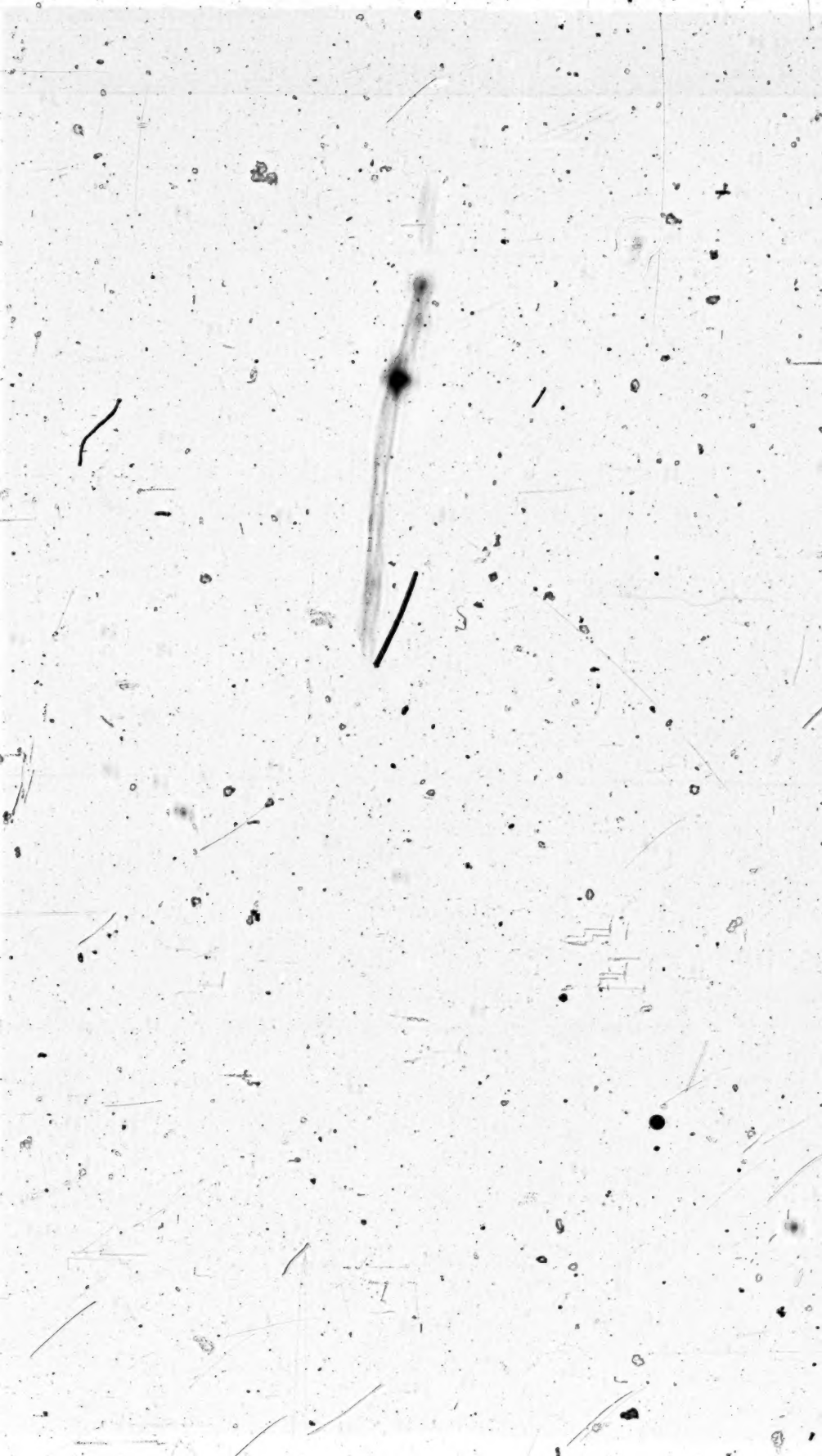
v.

ANDREW O. CLAUSON, et al.,
Appellee.

Cause No. 431

BRIEF AND ARGUMENT OF INDIANA AS AMICUS CURIAE

J. EMMETT MCMANAMON,
Attorney General of Indiana



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Argument

Indiana joins the Appellees and other amici curiae in submitting that the judgment of the New York Court of Appeals should be affirmed on the ground that the statute and rules and regulations adopted pursuant thereto by the New York Commissioner of Education and the New York City Board of Education are constitutional and valid as against Appellant's attack on them.

I.

Indiana has a statute* which authorizes the program of release time for religious education to be implemented by organizations who, through the wish of individual parents, have sought to establish a program of this nature.

Invalidation by this Court of the New York statute and the regulations promulgated pursuant thereto would seriously hinder the educational program as it has evolved in Indiana. Since the decision in *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 648, Indiana's program, and it is assumed those of other States, has been impaired to a great degree for fear of overstepping the boundaries, whatever they may be, as outlined in the McCollum decision regarding religious education and the first amendment to the United States Constitution. It is with this thought that we have felt it appropriate to make this short presentation in the present case.

II.

It is respectfully called to the attention of this Honorable Court that in 1787, the Congress of the United States, organized before the ratification of the Constitution, passed an ordinance concerning the Northwest Territory Government of which Indiana was a part. A portion of that ordinance reads as follows:

> "ARTICLES OF COMPACT—NORTHWEST TERRITORY.
>
> "* * *
>
> "Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness

* Burns, Indiana Stat. 1948 Rpl. Section 28-505 (a).

of mankind, schools and the means of education shall be forever encouraged. * * * "

July 13, 1787, 1 Stat. 51.

In 1800 Congress passed an Act dividing the Northwest Territory and creating, among others, the Indiana Territory. A portion of that Act reads as follows:

> "There shall be established within the said territory, a government, in all respects similar to that provided by the ordinance of Congress, passed on the 13th day of July, one thousand seven hundred and eighty-seven, for the government of the territory of the United States north-west of the river Ohio; and the inhabitants thereof shall be entitled to, and enjoy, all and singular, the rights, privileges, and advantages granted and secured to the people by the said ordinance." Burns, Vol. 1, Sec. 2, page 296.

In 1816, by Resolution of Congress, Indiana was admitted to the Union. Part of that resolution reads as follows:

> "WHEREAS, (pursuant to the enabling Act, the people of the Indiana Territory formed a constitution and state government which is republican in form) and in conformity with the principles of the Articles of Compact between the original states and the people and States in the territory northwest of the river Ohio passed on the *thirteenth day of July, one thousand seven hundred and eighty-seven.*"

Then follows the declaration of admission.

The Constitution of Indiana as adopted in 1851 reads in part as follows:

> "PREAMBLE. To the end, that justice be established, public order maintained, and liberty per-

petuated: WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution."

"Art. 1.

Section 2. All men shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences."

"Art. 1.

Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

"Art. 1.

Section 4. No preference shall ge given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

In 1943, the General Assembly of Indiana enacted a law cited *supra*. It reads as follows:

"If it is the wish of the parent, guardian or other person having control or legal custody of any child, that such child attend, for a period or periods to be determined by the local principal or superintendent of schools and not exceeding in the aggregate one hundred and twenty (120) minutes in any week, a school for religious instruction, conducted and maintained by some church or association of churches, or by some association organized for religious instruction, and incorporated under the laws of this state, and which school shall not be conducted or maintained, either in whole or in part, by the use of any

public funds raised by taxation; such child upon written request of the parent, guardian or other person having legal custody may be permitted to attend such school for religious instruction and such permission shall be valid for not longer than the school year during which it is issued. Such school for religious instruction shall maintain records of attendance which shall at all times be open to the inspection of the public school attendance officers. Attendance at such school for religious instruction shall be given the same attendance credit as at the public school." (Burns, Ind. Stat. 1948 Rpl. Sec. 28-505a).

In 1945-1946 various religious groups and interested parents implemented the provisions of this Act by initiating a program of released time religious education. The Indiana plan has, since this Court's decision in the McCollum case, been modified and represents a system similar to that which prevails at the present time in New York. See Appendix A.

The wall of separation that the Court rightly seeks to maintain could become an "iron curtain",

> *Zorach v. Clauson* (1951), — N. Y. —, 100 N. E. (2d) 463, 467,

if such systems as those which prevail in New York and Indiana, and those other states which have adopted similar programs, were to be struck down.

It would be redundant to restate the opinion of the New York Court of Appeals in the present case. Suffice it to say, that if there is a threat to the constitutional guaranties of this "religious nation" of ours, Church of Holy Trinity vs. U. S. 143 U. S. 457, 470, 12 Sup. Ct. 511, 36 L. Ed. 226, by virtue of the present plan, and those similar to it,

then the words of Thomas Jefferson (see the footnotes to Reed, J. Dissent, *Peaple ex rel. McCollum v. Board of Education*, 333 U. S. 203, 245, 68 Sup. Ct. 461, 481-2), become as empty mouthings of a platitudinous moralizer instead of one of the architects of our republican form of government.

Conclusion

For the reasons suggested in this brief and argued in the briefs of Appellee, as well as those of other *Amici Curiae*, Indiana respectfully submits that the judgment under consideration and review by this Honorable Court be sustained.

J. EMMETT MCMANAMON,
Attorney General of Indiana.

APPENDIX A

A comparative table of the Champaign, Indiana and New York plan for religious education.

	Champaign Plan	Indiana	New York
1. Public compulsory education law.	Illinois-Yes	Yes	Yes
2. Underlying enabling State Statute.	No	Yes—Burns Ind. Stat. 1948 Rpl. Sec. 28-505a	Yes
3. Parental request is required.	Yes	Yes	Yes
4. Teachers are employed by churches or church groups.	Yes	Yes	Yes
5. Teachers are subject to approval and supervision of the Superintendent of Schools.	Yes	No	No
6. Religious school enrollment cards are furnished and distributed by the school.	Yes	No	No
7. Segregation of students.	Yes	No	No
8. Religious training took place on school property.	Yes	No	No
9. Students not taking religious instructions continue to pursue regular school studies.	Yes	Yes	Yes
10. The place of instruction designated by school officials.	Yes	No	No
11. Pupils solicited in School buildings for religious instruction.	Yes	No	No
12. Maximum time such instruction may be given per week.	30-40 min.	120 min.	1 hour

	Champaign Plan	Indiana	New York.
13. Public money is used in furtherance of religious training.		No	No
14. Attendance records are kept.		No In an opinion of the A.G. 1948, Page The Attorney General suggested a modification of Indiana Plan to conform with the McCollum decision and a directive from the Superintendent of Public Instruction was issued to the local school authorities advising attendance records not be kept, nor attendance credit be given.	No
15. Credit is given for attendance at the religion class.		No See Number 14 above	No